IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHAWN DONLAY,
Appellant.

No. 2 CA-CR 2018-0210
Filed October 22, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201501542
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

DM Cantor, Phoenix
By Daniel Hutto, John Hudson, and Christine Whalin
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Eppich concurred.

S T A R I N G, Presiding Judge:

¶1 Shawn Donlay appeals his conviction for sexual conduct with a minor. He argues the trial court erroneously: (1) failed to suppress his statements to police; (2) admitted hearsay statements; and (3) improperly limited potential testimony about his wife's mental-health history. We affirm Donlay's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable factual inferences against Donlay. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In 2010, Donlay lived with his wife, E.D., their twelve-year-old son, C.D., and ten-year-old daughter, S.D. Donlay, E.D., and the two children all slept in the same bed. One night, Donlay came home late after drinking. E.D. and the children were asleep, but S.D. woke up when she heard Donlay open the door. Donlay went to S.D.'s side of the bed, undressed himself, and then undressed S.D. He then got into bed and inserted his penis into her vagina. S.D. tried to kick him away and repeatedly said, "I'm not mom," to which Donlay replied, "I know." S.D. was eventually able to wake up her mother, who took Donlay to another room. The next morning, S.D. had bruises on her arms and thighs.

¶3 In 2015, S.D. disclosed the incident during a forensic interview after she and her brother had been removed from the Donlay home by the Department of Child Safety (DCS).[1] Subsequently, Donlay agreed to an interview with a police detective. At the end of the interview, the detective arrested Donlay and he was charged with sexual conduct with

[1]Our references to DCS in this decision encompass Child Protective Services, which formerly administered child-welfare and placement services under title 8. *See* 2014 Ariz. Sess. Laws, ch. 1, § 20.

a minor, attempted sexual conduct with a minor, and sexual assault against a minor under the age of fifteen.[2]

¶4 After a jury trial, Donlay was convicted of sexual conduct with a minor and the trial court sentenced him to life in prison with the possibility of release after thirty-five years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Motion to Suppress

¶5 Donlay argues the trial court erred when it failed to suppress his statements made to police because they "were the product of an implied promise that he would regain custody of his children." "We review a trial court's ruling on a motion to suppress for abuse of discretion, considering only the evidence presented at the suppression hearing and viewing the facts in a light most favorable to sustaining the trial court's ruling." *State v. Adair*, 241 Ariz. 58, ¶ 9 (2016).

¶6 After DCS removed the children, Donlay voluntarily spoke to the detective at the police station. The detective advised Donlay of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The following exchange then occurred:

> Detective: Tell me, what do you think you're here for today?
>
> Donlay: Sir, could you just ask me the questions, please. My kids are gone.
>
> Detective: Yeah.
>
> Donlay: I'd like to get them back, please.
>
> Detective: Yeah. Well, what is this all about?

[2]The trial court dismissed the sexual assault count on the state's motion before trial and granted Donlay's motion for acquittal on the attempted sexual conduct count pursuant to Rule 20, Ariz. R. Crim. P.

> Donlay: I was told to report. I had to come and talk to you before the kids are allowed to come back home.
>
> Detective: Okay. About what?
>
> Donlay: [S]omething that happened six years ago.

¶7 Throughout the interview, Donlay repeatedly said that he had been too intoxicated on the night in question to remember what had happened, but his wife had told him the following day that he had "made advances towards [S.D.]." When asked to explain what "advances" meant, Donlay said his wife had told him he was "[t]rying to pull [S.D.] towards [him]" and, "I think I wanted to have sex or have an oral." Donlay insisted that although he was told he had been pulling S.D. towards him because he "was either wanting to have sex or a blow job," neither act had occurred.

¶8 Before trial, Donlay moved to suppress his statements as involuntary. At the suppression hearing, Donlay first testified that a DCS worker had told him he needed to cooperate with the police in order to have his children returned, but minutes later, he testified that it had been a police officer. The trial court noted the inconsistency, concluded Donlay's testimony was "not credible and cannot be relied on," and denied his motion to suppress his statements to police.

¶9 On appeal, Donlay asserts his statements to the detective were involuntary because they "were the product of an implied promise that he would regain custody of his children" if he spoke with the police. Specifically, Donlay argues DCS advising him that his children would not be returned until after he cooperated with the police amounted to a promise. He further contends his statements were involuntary because the detective did not correct Donlay and instead allowed him to believe he needed to cooperate in order to have his children returned. Thus, Donlay argues, his statements "were clearly obtained by the direct promise from DCS that he had to talk to the detective in order to get his children back." Donlay also argues the detective either made a promise or threat when he told Donlay he needed to divulge what happened in order to move on and get his family back. Lastly, Donlay asserts his statements were involuntary because the detective did not inform him he was the subject of a criminal investigation or of the nature of the allegations against him.

¶10 The state counters that the trial court properly denied Donlay's motion to suppress because, other than his testimony, which the

court found unreliable, there is no evidence of him being told he needed to cooperate with the police to secure the return of his children. The state also argues the factors of admissibility listed in A.R.S. § 13-3988(B), including the *Miranda* advisement, weigh in favor of finding his statements to have been voluntary.

¶11 "To be admissible, a statement must be made voluntarily and not obtained by coercion or improper inducement." *State v. Rushing*, 243 Ariz. 212, ¶ 60 (2017). "Promises of benefits or leniency, whether direct or implied, even if only slight in value, are impermissibly coercive." *State v. Lopez*, 174 Ariz. 131, 138 (1992). "Before a statement will be considered involuntary because of a 'promise,' [however,] evidence must be established that (1) a promise of a benefit or leniency was in fact made, and (2) the suspect relied on that promise in making the statement." *Id.* "Mere advice from the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." *State v. Amaya-Ruiz*, 166 Ariz. 152, 165 (1990).

¶12 As noted, at the suppression hearing, Donlay testified inconsistently whether a DCS worker or a police officer had told him he needed to cooperate with the police in order for his children to be returned. The trial court thus concluded Donlay's testimony was not credible. Deferring to the court's credibility determination, *see State v. Waller*, 235 Ariz. 479, ¶ 5 (App. 2014), and absent any other evidence of DCS or the police telling Donlay he needed to speak with the police in order to secure the return of his children, we conclude a promise of leniency or benefit was not made. *See Lopez*, 174 Ariz. at 138 ("We find no error in the trial court's determination that Lopez'[s] statements were voluntarily made.").

¶13 Donlay argues for the first time on appeal that the detective also promised or threatened him when he "discussed counseling and how [Donlay] needed to divulge what happened in order to move on and get his family back." Because he did not raise this argument below, we review only for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12-13 (2018); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005); *cf. State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection on one ground does not preserve issue on another ground). And, because Donlay does not argue any error was fundamental, his argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument waived where defendant does not argue fundamental error).

¶14 Next, we consider whether Donlay's statements were involuntary because the detective did not inform him he was the subject of a criminal investigation or of the nature of the offenses being investigated. When determining whether a statement is voluntary, the trial court considers all the circumstances surrounding the statement, including whether the defendant "knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." § 13-3988(B). Also among the factors enumerated in § 13-3988(B) are: the time elapsed between the arrest and arraignment (if the statement was made after arrest and before arraignment), whether the defendant "was advised or knew that he was not required to make any statement and that any such statement could be used against him," whether the defendant was advised prior to questioning of his right to the assistance of counsel, and whether the defendant was without the assistance of counsel when questioned. And, "[t]he presence or absence of any of the factors indicated in [§ 13-3988(B)] which are taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." § 13-3988(B)(5).

¶15 Here, the detective neither informed Donlay he was the subject of a criminal investigation nor of the nature of the offenses of which he was suspected. But these facts are not dispositive. *See id.*; *see also State v. Walden*, 183 Ariz. 595, 610 (1995) (knowledge of charges not conclusive in determining voluntariness), *rejected on other grounds by State v. Ives*, 187 Ariz. 102 (1996). Further, in this instance, the other § 13-3988(B) factors weigh in favor of the trial court's conclusion that the statements were voluntary. First, Donlay was arrested *after* his statements to the detective. Second, although the detective did not advise Donlay of the precise offenses, Donlay already knew that he was suspected of "making advances" towards his daughter and that DCS had removed his children because of "[n]eglect and sexual abuse." Third, before questioning began, the detective read Donlay the *Miranda* advisement, and Donlay said he understood he was not required to answer questions and his statements could be used against him. Finally, although Donlay did not have an attorney present for questioning, he confirmed he understood his right to counsel before questioning began. Based on these facts, we conclude the court did not abuse its discretion in finding Donlay's statements voluntary. *See* § 13-3988(B).

E.D.'s Statements

¶16 Donlay argues the trial court erred by admitting "out of court hearsay statements of [his wife]" that he recounted during his police interview. Because Donlay failed to object to the admission of these

statements on hearsay grounds, we review for fundamental error. *See Escalante*, 245 Ariz. 135, ¶¶ 12-13; *Lopez*, 217 Ariz. 433, ¶ 4.

¶17 As noted, Donlay's statements to police were admitted at trial. On appeal, he contends the statements were "recitations of [E.D.]'s out of court statements offered for the truth of the matter asserted that he had sexual contact with his daughter" and, therefore, were not admissible as party-opponent statements under Rule 801(d)(2)(A), Ariz. R. Evid. Relying on *State v. Anderson*, 210 Ariz. 327 (2005), Donlay further argues he did not adopt E.D.'s statements about what happened as true because he never claimed to have personal knowledge of the allegations and, therefore, could not expound upon them, and because he denied the allegations.

¶18 The state counters that no error occurred because "[E.D.]'s statements to Donlay were not admitted for the truth of the matter asserted[,] but for Donlay's reactions" and, therefore, were not hearsay. The state also asserts that even if the statements were hearsay, they were admissible under the party-opponent exception because Donlay "expressly adopted [E.D.]'s statements." Lastly, the state contends Donlay cannot show fundamental error because such error "occurs only when the hearsay is the sole proof of an essential element of the offense," and E.D.'s statements as recounted by Donlay were not the only proof because S.D.'s testimony was the primary evidence of the offense.

¶19 Generally, "if hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes." *State v. McGann*, 132 Ariz. 296, 299 (1982). But, "[w]hen hearsay evidence is the sole proof of an essential element of the state's case, reversal of the conviction may be warranted." *Id.* And, "if the admission of hearsay evidence amounts to fundamental error in a criminal case, we will reverse even if the defendant has failed to object to its admission." *Id.* "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385 (1991).

¶20 Hearsay is an out-of-court statement offered "in[to] evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c); *see also Lopez*, 217 Ariz. 433, ¶ 8. A statement is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Ariz. R. Evid. 801(a). Hearsay statements are generally inadmissible, unless they fall within a recognized exception. Ariz. R. Evid. 802; *see also Lopez*, 217 Ariz. 433, ¶ 8. One such exception is a statement made by an opposing party, including a statement "the party manifested that it adopted or believed to be true." Ariz. R. Evid. 801(d)(2)(B). "A

statement by a third party offered against a defendant who has 'manifested an adoption or belief in [the statement's] truth' is similarly not hearsay." *Anderson*, 210 Ariz. 327, ¶ 36 (alteration in original). A party adopts a statement when he "affirmatively agrees to statements made in his presence, or expounds on the statements by adding his own 'explanations and comments.'" *Id.* (quoting *State v. Daugherty*, 173 Ariz. 548, 550 (App. 1992)).

¶21 E.D.'s statements to Donlay were admissible as party-opponent statements because Donlay manifested adoption or belief in their truth when he expounded on them by adding his own explanations and comments. Specifically, although Donlay told the detective he did not remember the alleged incident and E.D. did not tell him the details of his actions, he expounded on E.D.'s statements when he explained that "advances" towards his daughter meant he was pulling her towards him because he "was either wanting to have sex or a blow job." He also manifested his belief that E.D.'s statements were true when he said, "I wish this had never happened, but it did," and "[w]hat I did . . . I couldn't tell you. But it doesn't matter . . . . There's absolutely no—no excuse. Something I'm going to have to live with." And, Donlay said he did not believe E.D. was lying, thus manifesting his belief that her statements were true. Thus, E.D.'s statements were admissible under Rule 801(d)(2)(B). We find no error, fundamental or otherwise.

¶22 Moreover, even if E.D.'s statements were hearsay, they were not the sole proof of any of the essential elements of sexual conduct with a minor: S.D. herself testified to each element of the offense. *See State v. Jerousek*, 121 Ariz. 420, 427 (1979) ("In child molestation cases, the defendant can be convicted on the uncorroborated testimony of the victim."). Thus, reversal is not warranted. *See McGann*, 132 Ariz. at 299.

E.D.'s Mental-Health History

¶23 Donlay next argues the trial court erred when it did not allow him to question E.D. about her mental-health history and by limiting the discussion of her mental health. We review the court's ruling on the admission of evidence for an abuse of discretion. *See State v. Cota*, 229 Ariz. 136, ¶ 10 (2012).

¶24 Before trial, the state moved to preclude testimony about E.D.'s mental-health diagnoses as irrelevant, unduly prejudicial, and not essential to the case. Donlay argued he should be permitted to cross-examine E.D. about her mental health and her testimony was admissible as

a lay-witness opinion. The trial court concluded E.D. and other witnesses could testify to admissions E.D. had previously made about her mental health generally and to "behaviors that they have observed that raise questions about her ability to perceive, [and] her ability to relate accurately what happened." But, apart from relaying her own admissions about her mental illness, they could not testify that she was mentally ill. The court explained that E.D.'s specific diagnoses were precluded because they are "the subject of expert testimony," and without such testimony, the court was "very concerned that those labels may be misconstrued," "misinterpreted," and "lead to misconceptions and stigma." The court also clarified that if E.D. could demonstrate in a hearing that she could explain her mental-health conditions to the jury, then her specific diagnoses would be admissible.

¶25 Donlay also sought to admit evidence of E.D. allegedly telling S.D. to lie to DCS officials about E.D.'s mental health several months after S.D. disclosed the sexual conduct during her forensic interview. Donlay asserted that he offered the evidence not for the truth of the matter asserted, but "to show somebody trying to influence the witness" in order to argue E.D. telling S.D. to lie "is not an isolated incident. This has happened before." The state countered that evidence of E.D. asking S.D. to lie about something more than six months after S.D. disclosed the sexual conduct was irrelevant and "too remote especially if [E.D.] is not testifying." The trial court concluded the incident in which E.D. allegedly asked S.D. to lie at school was "too far after" the disclosure of the sexual conduct "unless [S.D.] somehow can say that incident affected her decision—and there's no way she could do that." The court also noted S.D. could testify about "generally how [E.D.] may influence her."

¶26 At trial, S.D. testified that E.D. had memory problems and suffered from an eating disorder and depression. Donlay testified that E.D. had "a mental disability" and an eating disorder, managed finances irresponsibly, shoplifted, slept excessively, took medication and then forgot she had already taken some, and occasionally forgot to go to work or that her children had to go to school. But Donlay never requested a hearing to determine whether E.D. could explain her diagnoses; nor did he provide an expert to testify about them. Further, Donlay never called E.D. as a witness and voluntarily withdrew his subpoena requiring her to testify.

¶27 Donlay argues the trial court's ruling resulted in him being unable to discuss E.D.'s mental illness, which "resulted in profound prejudice" because his police interview was comprised of statements he made after E.D. told him what had happened. Donlay also argues that due

to the court's ruling, he was unable to call E.D. as a witness "because the primary issue he was prepared to address, her mental illness, ability to perceive, and ability to make accurate statements, was limited by the court."

¶28 The state argues Donlay misinterpreted the trial court's ruling and contends the ruling expressly permitted the topics of E.D.'s ability to properly perceive events and how her mental health affected her daily life, but "with the exception of the specific label of the type of mental illness she had." Specifically, the state asserts Donlay's "lay-witness argument has no factual basis," Donlay could have called E.D. as a witness, and E.D. could have testified about her own diagnoses, provided either she or an expert laid sufficient foundation. The state further argues that without foundation or an offer of proof to explain how E.D.'s memory issues and behavior were connected to a specific mental illness, the actual diagnoses were irrelevant. Finally, the state asserts that any error in limiting testimony on the subject of E.D.'s mental health was harmless because multiple witnesses testified that she had mental illnesses that resulted in memory problems.

¶29 "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ariz. R. Evid. 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Ariz. R. Evid. 403. Generally, we will not disturb a trial court's Rule 403 determination absent a clear abuse of discretion. *See State v. Bocharski*, 200 Ariz. 50, ¶ 21 (2001).

¶30 Here, even assuming E.D.'s mental-health diagnoses were relevant to the issue of whether Donlay sexually assaulted S.D., the probative value of her diagnoses would have been substantially outweighed by the danger of confusing the issues or misleading the jury under Rule 403, as recognized by the trial court's concern "that those labels may be misconstrued," "misinterpreted," and "lead to misconceptions and stigma." Thus, we conclude the court did not err by excluding her mental-health history and diagnoses.[3]

[3]In light of our disposition of the matter, we need not decide whether Donlay made an adequate offer of proof as to what E.D. would have said about her mental health if she had testified.

¶31 Further, Donlay misinterprets the trial court's ruling. As noted, the court expressly permitted E.D. and other witnesses to testify about her statements regarding her mental health generally, as well as about her behavior that affected her memory, and her ability to perceive and relate events accurately. The court's ruling merely precluded the use of mental-health labels and diagnoses, absent an expert or E.D. explaining them.

¶32 Additionally, although Donlay appears to suggest testimony about E.D.'s mental health was admissible lay-witness testimony under Rule 701, Ariz. R. Evid., he does not develop this argument on appeal; thus, we do not consider it. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."). Similarly, Donlay notes the trial court precluded evidence of E.D. allegedly asking S.D. to lie to DCS about E.D.'s mental health, but he fails to develop this argument on appeal. Therefore, his argument is waived. *See id.*

Disposition

¶33 For the foregoing reasons, we affirm Donlay's conviction and sentence.